IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CALVIN CANNADY **PLAINTIFF**

v. **No. 1:15CV44-GHD-JMV**

CLAY COUNTY, MISSISSIPPI **DEFENDANT**

MEMORANDUM IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Plaintiff Calvin Cannady files this, his Response to Defendant's Motion for Summary Judgment as follows:

The Defendant Sheriff Eddie Scott has filed a Motion for Summary Judgment in this matter claiming there are no genuine issues of material fact at issue. The Defendant claims that there is no basis for a claim against the Sheriff that he violated Plaintiff's Sixth Amendment speedy trial rights in that he complied with all orders in Plaintiff's criminal case; that he was not responsible bringing the criminal charges against Plaintiff; that he was not responsible for his indictment; and that he was not responsible for subsequent delays in the criminal charges being taken to trial.

This Court must now determine whether there is a genuine issue as to any material fact which would preclude judgment as a matter of law. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." F.R.C.P. 56(c). For the Defendant to prevail, he must show: No genuine (i.e., triable) dispute of a material fact which "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)); and that he is therefore entitled to a judgment under the applicable substantive law. In considering whether a "genuine issue" exists, "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Liberty Lobby, Inc*., 477 U.S. at 255.

INTRODUCTION

1. On March 6, 2015, the Plaintiff brought his Complaint against Clay County and Sheriff Eddie Scott alleging *inter alia* a violation of his right to a speedy trial.

2. On August 19, 2015, this court dismissed all claims of the Plaintiff except for his speedy trial claims against the Sheriff.

FACTS

3. On October 10, 2011, a Clay County Grand Jury returned an indictment against Plaintiff with the charge of burglary.

4. On April 26, 2012, the Plaintiff made bond and was released that day.

5. The Plaintiff was brought back to Clay County from Jackson, Mississippi three times to attend a preliminary hearing in Justice Court.

6. On July 9, 2012 the Plaintiff waived his arraignment and entered a plea of not guilty. Trial was then set for October 12, 2012.

7. On October 9, 2012, three days before trial, the court entered a bench warrant for Plaintiff's arrest, directing the Sheriff to bring Cannady instantanter before the court. The warrant issued due to Cannady's failure to appear at a pre-trial status conference.

8. October 29, 2012, Cannady was arrested by the Flowood Police Department pursuant to the Bench Warrant.

9. On November 9, 2012 the Defendant retrieved the Plaintiff and transported him to the Clay County Detention Center for processing and detention. The Plaintiff remained incarcerated from October 29, 2012, to October 14, 2013. The Plaintiff was never brought before the court as ordered.

ARGUMENT

10. To determine a speedy trial claim, the case of *Barker v. Wingo* directs courts to examine (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. 530, 92 S.Ct. at 2192.

A. Length of Delay

The right to a speedy trial attaches, and the time begins running, at the time of arrest or indictment, whichever comes first, *United States v. MacDonald*, 456 U.S. 1, 6-7, 102 S.Ct. 1497, 1501.

Mississippi courts have held that a delay of eight months may be presumptively prejudicial. *Smith v. State*, 550 So.2d 406, 408 (Miss.1989); The Fifth Circuit generally requires a one year delay for purposes of speedy trial analysis. *Millard v. Lynaugh*, 810 F.2d 1403, 1406 (5th Cir.). Any delay longer than one year is "presumptively prejudicial", *Doggett v. United States* 112 S.Ct. at 2691.

The two year delay between Plaintiff's indictment on October 10, 2011 and the Court's entry of its *Nolle Prosequi* Order of October 14, 2013 clearly meets the "presumptively prejudicial" standard and falls well beyond the one year delay required by the Fifth Circuit.

B. Reason for Delay

The speedy trial clock tolls if the responsibility for the delay is attributable to the Criminal defendant rather than the state. A defendant, for example, will not be heard to complain of a lapse of time attributable to continuances he sought and received from the trial court. *Davis*, 857 F.2d at 1041.

In his Motion for Summary Judgement the Defendant alleges that he abided by the Court ordered bench warrant by notifying the Circuit Clerk of the arrest and detention by way of a "return of a search warrant". The defendant states in his affidavit that "it was his understanding" that the Court Administrator would be aware that the criminal defendant was in custody after he filed the return warrant with the Circuit Clerk.

There is nothing in the record indicating that a return on capias warrant was filed after the Plaintiff's October 29, 2012 arrest. Even had a return been filed, the Sheriff failed to follow the specific orders of the court to bring the Plaintiff before the Court instantater upon his arrest. The record itself establishes that the Plaintiff was never brought before the court as ordered and clearly contravenes the Defendant's contention that he was.

The affidavit continues with a statement that the Plaintiff was represented by counsel during his "entire stay" at the Clay County Jail. The Defendant appears to argue that it was the Responsibility of the Circuit Clerk or defense counsel's to carry out the order of the Court. A plain reading of the warrant indicates that the sole responsibility of bringing the Plaintiff before the court laid with the Sheriff. Additionally, the Defendant's court appointed attorney could not represent the Plaintiff due a conflict of interest leaving him unrepresented from the time he was arrested until April 16, 2013.

The Defendant further claims that Plaintiff caused his own delay by filing two continuances with the Court. The first order of continuance, filed in April 5, 2013, granted additional time to Plaintiff's counsel to prepare. The second continuance was not requested by the Plaintiff but was made on the Court's own motion on August 21, 2013. However, by April 5, 2013, it had been nearly eighteen months since the Plaintiff's indictment-far exceeding the one year requirement for a speedy trial analysis.

The Plaintiff's failure to appear at the October 9, 2012 status Conference tolled the speedy trial clock for only 20 days. If utilizing the Defendant's claimed date of incarceration, November 9, 2012, the speedy trial clock tolled for only thirty days (30). Whichever date one chooses to rely upon, the sheriff's failure to produce the Plaintiff as ordered re-started the clock.

The Defendant's Motion and accompanying affidavit fails to demonstrate the absence of any material fact. Indeed, the Defendant's affidavit highlights the factual dispute as to whether the Plaintiff was presented to the Court in a timely manner. The Defendant's written pleas to the Sheriff; the length of the delay, the reasons for the delay; the Sheriff's failure to file a return capias and the absence in the record of any court appearances by the Plaintiff support a strong inference that the Plaintiff was not brought to the Court in a timely and appropriate manner.

The Defendant's claims that Plaintiff caused the delay are irrelevant for summary judgement purposes. By the time the April 5, 2016 continuance was filed, it had been eighteen months since the Plaintiff's indictment. Further, the Sheriff had received correspondence from the Plaintiff that he still had not been brought before the Court. Additionally, the Plaintiff had also filed a Motions for Speedy Trial (Please see Exhibit A attached) and a Motion Not to Continue (See Exhibit B attached) with the court in February and March respectively. Such evidence controverts the claims of delay made by the Defendant and present multiple issues of triable fact.

C. **Plaintiff adequately asserted his speedy trial rights**

The Plaintiff filed a handwritten Motion for Speedy Trial on February 11, 2013 (Please see Exhibit A attached). Plaintiff also filed a Motion for No Continuation or Delay (See Exhibit B attached). Plaintiff also mailed correspondence to the Clay County Board of Supervisors and the Sheriff's Department of Clay County. (Please Exhibits C and D attached).

The filings of Plaintiff more than adequately asserted his desire for a speedy trial. Such an assertion "is entitled to strong evidentiary weight," according to *Barker*. id. 407 U.S. at 531, 92 S.Ct. at 2192.

D. Prejudice to the defendant

The *Barker* analysis requires an examination of whether the defendant was prejudiced by the delay between accusation and trial. That case recognized three separate harms that may result from such delays: (1) " 'oppressive pretrial incarceration' "; (2) " 'anxiety and concern of the accused' "; and (3) " 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193). The Plaintiff's being incarcerated for nearly twelve (12) months would certainly qualify as "oppressive pretrial incarcerations". The anxiety and concern of the accused is amply documented in his many letters and motions pleading for justice. As to the third harm, the Supreme Court has held that "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett* v. U.S. 112 S.Ct. at 2692.

Indeed, such a showing may prove unnecessary when other *Barker* factors such as the length and reason for the delay weigh heavily in the criminal defendant's favor. *Gray*, 724 F.2d at 1204; *United States v. Avalos*, 541 F.2d 1100, 1116 (5th Cir.1976). Criminal defendants may also be relieved of proving specific prejudice where an unusually lengthy delay has its source in "official bad faith" or the prosecutor's desire to gain a tactical advantage. *Doggett*, 112 S.Ct. at 2693; *Barker,* 407 U.S. at 531 & n. 32, 92 S.Ct. at 2192 & n. 32.

As detailed above, the length of delay was almost two years and was proximately caused by the Sheriff's failure to bring the Plaintiff before the Court. These factors weigh heavily in Plaintiff's favor thus making the showing of specific prejudice unnecessary.[1] The *Doggett* Court held that negligence on the part of the government may also ease the requirement of making a detailed showing of prejudice. *Doggett* at, 112 S.Ct. at 2693. Fifth Circuit precedent holds that deliberate delaying tactics are to weigh heavily against the government with negligence weighing less heavily, *Gray v. King*, 724 F.2d 1199, 1203 (5th Cir.1984) (citing *Barker*, 407 U.S. at 989 F.2d 853 531, 92 S.Ct. at 2192). Although the Court in *Doggett* held that negligence "still falls on the wrong side of the divide between acceptable and unacceptable reasons for delay." 112 S.Ct. at 2693.

---

[1] Although the Plaintiff would submit that had he been brought to trial in the January term, the case would have been dismissed due to the absence or recalcitrance of a material witness. Further, the Defendant's failure to obey court orders delayed the appointment of a new attorney who could have moved for trial in the January or April term.

The proper focus here is on the Sheriff's failure to bring the Plaintiff before the Court as ordered. Further consideration should given to what actions, if any, the Sheriff took after he knew or should have known of Plaintiff's continued incarceration without a court appearance. (Please see Letter to Eddie Scott attached as Exhibit D). As the Sheriff and chief detention officer in the county, the Defendant could have made reasonable inquiries to the District Attorney's Office and the Clay County Circuit Court as to the status Plaintiff's case. There is nothing in the record that any inquires were made. Such inaction by the Defendant would indicate either deliberate or negligent behavior and should weigh heavily in the Plaintiff's favor.

A determination of whether these circumstances constitute harm to the Plaintiff are questions of fact for a jury to determine. A determination as to whether the Sheriff acted negligently or deliberately in failing to bring the Plaintiff before the Court is likewise a question for the trier of fact. Oppressive pretrial incarceration may be inferred from the fact that one year elapsed between the October 29, 2012 arrest and the dismissal of the case. The anxiety and concern of the accused is certainly a question of fact as the record contain multiple documents for consideration by the jury.

11. **Qualified Immunity is Not Available**

A, The qualified immunity test involves a finding of 1) "whether the Plaintiff has alleged a violation of a clearly established right and, if so, 2) whether the Defendant [official's conduct was objectively unreasonable." *Palmer v. Johnson*, 193 F.3d 346 (5th Cir. 1999). As a criminal defendant, the Plaintiff had a clearly established right to a speed trial under the Sixth Amendment of the U.S. Constitution. Pursuant to the Court issued Bench Warrant, the Sheriff was the sole official tasked with bringing the Plaintiff before the court instantanter . The failure of the Sheriff to present the Plaintiff before the court was objectively unreasonable and was in direct contravention of the orders of the Court. As stated above, the Sheriff arrested and incarcerated the Plaintiff for one year before he was ever brought before the court. The Plaintiff made direct pleas to the Sheriff to inquire as to the delay but to no avail. These actions and inactions by the Defendant represent either deliberate or negligent behaviour that cannot be considered objectively reasonable in light of clearly established law.

CONCLUSION

For the foregoing reasons the Plaintiff's suit should be allowed to proceed to trial as there are genuine issues of triable evidence concerning the length of the delay of a speedy trial; the reason for the delay of trial; the Plaintiff's assertion of his speedy trial claim and the harm he suffered as a result of the delay. The totality of the circumstances shows a the clear violation of Plaintiff's right to a speedy trial. Thus, the Defendant's Motion for Summary Judgment should be denied with all cost attributed to the Defendant.

This the 21st day of June, 2016.

Respectfully submitted,

By:/s/ William S. Kellum
WILLIAM KELLUM

CERTIFICATE OF SERVICE

I, the undersigned, Attorney for Plaintiffs, do hereby certify that I have this day served VIA MEC electronic filing a true and correct copy of the above and foregoing Plaintiff's Response to Defendant's Motion for Summary Judgment unto:

Berkley N. Huskison, Esq
MITCHELL MCNUTT & SAMS
P. O. Box 1366
Columbus, MS 39703-1366
(662) 328-2316
Email: bhuskison@mitchellmcnutt.com

This the 21st day of June, 2016.

/s/ William S. Kellum
WILLIAM S. KELLUM (MBN 101898)

PREPARED BY:

KELLUM LAW FIRM, P.C.
WILLIAM S. KELLUM – BAR # 101898
(ATTORNEY FOR PLAINTIFF)
P.O. BOX 4318
JACKSON, MISSISSIPPI 39296
TELEPHONE: (601) 969-2709
FACSIMILE: (601) 969-2161

Exhibit C

IN THE SIXTEENTH JUDICIAL DISTRICT OF
CLAY COUNTY, WEST POINT, MISSISSIPPI

STATE OF MISSISSIPPI

VS CAUSE NO. 9601 CC

CALVIN CANNADY

MOTION FOR SPEEDY TRIAL

COMES NOW, I CALVIN CANNADY, PRO SE, do move this Honourable Court for a "Speedy Trial" in the questionable or challengable indictment in the above style cause of action, pursuant to Amendment 5, 6, 8, 13, 14, 15 and 18th of the U.S. Constitution and laws of this state for reasons as follows:

1.) The indictment in this cause of action was allegedly issued in the October Term, 2011, and thus statutory time limit is questionable;

2.) This defendant also questions legitamatcy of constitutionality of indictment as passed by grand jury due to lack of evidence;

FILED COUNTY
FEB 11 2013
[illegible signature]

EXHIBIT
A

3.) Because this indictment is over two (2) years pending trial without defendant causing delay, this defendant request that all motions be heard promptly for a expected trial in April Term, 2013, or sooner;

4.) This defendant does not give appointed lawyer Mark Cliett permission to continue or delay trial, for defendant has been denied preliminary hearing and held in pretrial detention illegally and unjustly;

5.) Congested docket cannot be excuse for failure to expedite trial, for defendants' lengthy months in pretrial detention have witnessed no trials in Clay Circuit Court;

6.) Any and all witnesses for the state prosecutions' case works for the state and thus there should be no problem expediting this trial if legally permisable by U.S. Constitution.

WHEREFORE PREMISES CONSIDERED, I CALVIN CANNADY, PRO SE, do ask that this Honourable Court grant this Motion For Speedy Trial in a expedited fashion.

FILED CLAY COUNTY
FEB 11 2013
Robert D Ham[illegible]

CERTIFICATE OF SERVICE

This is to certify that I Calvin Cannady, Pro Se, have this day mailed a true and correct copy of said Motion For Speedy Trial to the following:

1.) Robert D. Harrell, Circuit Clerk
c/o Judge Coleman
P.O. Box 364
West Point, MS 39773

2.) Forrest Allgood, D.A.
P.O. Box 1044
Columbus, MS 39703

3.) Mark Cliett, Appointed Attorney
515 Hwy. 45 N. Ste. A
West Point, MS 39773

This the 7th day of February 2013.

Signed: Calvin Cannady
Calvin Cannady, Pro Se

FILED CLAY COUNTY
FEB 11 2013
Robert D Harrell Jr

Notary: ____________

IN THE SIXTEETH JUDICIAL DISTRICT OF CLAY CO.
WEST POINT, MISSISSIPPI

Exhibit D

STATE OF MISSISSIPPI

VS

CALVIN CANNADY

FILED
MAR 1 2 2013
Rout ...

CAUSE NO. 9601CC

MOTION FOR NO CONTINUATION OR DELAY

COMES NOW, I CALVIN CANNADY, PRO SE, pursuant to Amendments of the U.S. Constitution and Rules of Circuit and County Court Procedure, for a judgement; do move this Honourable Court in the above styled cause of action for a summary judgement either by trial or order dismissing the indictment in the April Court Term with no continuation or cause for delay for reasons as follows:

1.) Because indictment was allegedly passed in the October Term of 2011; this April Court Term of 2013, with no new evidence, should be sufficient enough time to bring about closure;

2.) Because state prosecution case is solely "hearsay" and lacks merit, no continuation or delay is feasable;

3.) Statute of limitation is legally questionable and defendant raises issue of challenge and legality of trial.

WHEREFORE PREMISES CONSIDERED, I CALVIN CANNADY

EXHIBIT
B

FILED
MAR 1 2 2013
Robert D. H...

PRO SE, do move this Honorable Court to not continue or cause delay for summary judgement in the April Court Term of 2013, in the above styled cause of action and that hearing date be set.

CERTIFICATE OF SERVICE

This is to certify that I Calvin Cannady, Pro Se, have this day mailed a true and correct copy of said Motion For No Continuation Or Delay to the Circuit Court and all persons of interest.

1.) Robert D. Harrell, Circuit Clerk
c/o Judge Coleman
P.O. Box 364
West Point, MS 39773

2.) Forrest Allgood, D.A.
P.O. Box 1044
Columbus, MS 39703

3.) Mark Cliett, Appointed Attorney
515 Hwy. 45 N. Ste. A
West Point, MS 39773

This the 11th day of March, 2013.

Signed: Calvin Cannady
Calvin Cannady, Pro Se

Notary: ______

Mr. Calvin Cannady
P.O. Box 142
West Point, Ms. 39773

GRENADA MS 389
13 MAR 2013 PM 1 T

RECEIVED ON THIS DATE
MAR 14 2013
Clay Co. Chancery Office

Board Of Supervisors, C
P.O. Box 815
West Point, Ms. 39

39773$0815

EXHIBIT
C

Clay County Jail
P. O. Box 142
West Point, MS 39773

MEMORANDUM

March 13, 2013

TO: Board Of Supervisors, Clay County
P.O. Box 815
West Point, MS 39773

FILED
STATE OF MISSISSIPPI
CLAY COUNTY
13 MAR 19 PM 2:48
Amy G. Berry

FROM: Calvin Cannady
P.O. Box 142
West Point, MS 39773

RE: "A Cry For Justice"

Greetings:

It was imperative that I write unto this Board of Supervisors; for after several attempts to correspond by letters to Sheriff Eddie Scott and court-appointed attorney Mark Cliett with no response; it's mental anguish and emotionally disheartening to endure "judicial misconduct of a failed court system. I have further filed "motions" in the circuit court to no avail, for I have been denied access to the court of a "Evidentiary or Preliminary Hearing", which would have granted me due process of law and ended this farce. Though I was not arrested during the commission of a crime (burglary) in Clay County; nor was any alleged items supposedly stolen found in my possession from Clay County; nor can any officer or detective place me in Clay County at time of a crime— I can prove and clearly show from the states "discovery" or lack thereof, that the district attorney clearly mislead or deceived the grand jurors and/or tainted the process. The states case against me is solely "hearsay" on every witness (2) account, and a conviction will never be granted! Officer Birchfield demoted I'm sure for his unprofessional and unethical tactics as a detective initiated this miscarriage of justice by his rush-to-judgement. If Sheriff Scott knew his range of power, after receiving my four (4) correspondences detailing the facts, he could have faithfully handled this matter. All I ask of this Board of Supervisors is to ensure that I am brought to trial this April Term of 2013, or that this unfounded and meritless burglary charge be dropped or dismissed due to insufficient evidence. The burglary allegedly occurred on the 8th day of February 2011, and I was allegedly indicted in the October Term of 2011, so there should be no continuance or delays in this two (2) years old case! I am a resident of Jackson, Hinds County and was kidnapped (brought) from Jackson and brought here to Clay County unjustly and illegally on a "hearsay" accusation. Although I have been allowed to bond out twice on same charge, Detective Birchfield and bondman Sherry Williams can vouch that I drove from Jackson on three (3) separate occasions for a preliminary hearing, but never came before a judge due to over crowding. My mother passed 6/13/12 and it threw me mentally and emotionally to miss my October 2, 2012, status conference, for which a warrant NISI was issued for my arrest. I should at least be released on the reinstated bond if not brought to trial or charge dismissed. I thank you to the utmost for your discretion.

Respectfully,

Calvin Cannedy [signature]

Calvin Cannedy

MEMORANDUM

January 31, 2013

TO: Eddie Scott, Sheriff
Clay County Jail

FROM: Calvin Cannady
South, Cell #2
Clay Co. Jail

RE: Judicial Misconduct

Greetings:

This is now my third time writing unto you in attempt to get you to exercise your discretion of jurisprudence as a sheriff is expected and elected to do, even if it i[s] to correct a wrong of other judiciary officers. I am fro[m] Jackson, Hinds County, and feel as though I was kid-napped and brought here. Once Detective Birchfield, now dem[ot]ed, came to Pontotoc Co. Jail on 3/11/11 to question me a-bout a business burglary to which I had no knowledge an[d] confessed my innocense. This unprofessional Birchfield for some distorted reason had me charged without any evidenc[e] or merit. I was not arrested during the commission of a crim[e] nor was any alleged stolen items ever found in my possession; nor can any detective, officer, or camera surveilance place me i[n] Clay County at any time. This case will never go to trial and I will never plead guilty! I have nine (9) children that I love and depend on me; and I'm taking up bedspace illegally and unjustly. I'm asking you for the last time to make the righteous judgement call and see if what I have said is the truth. I have every intent of filing civil charges against this whole ... miscarriage of justice. All I want is to

EXHIBIT D